No. 07-10

Supreme Court, U.S.
FILED
2007
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IN THE

SUPREME COURT OF THE UNITED STATES

JOSE CHIMAL MONDRAGON

Petitioner

v.

PETER D. KEISLER, ACTING ATTORNEY GENERAL

Respondent

On Petition or a Writ of Certiorari To The United States Court of Appeals For The Ninth Circuit

USCA No. 07-72050
Agency No. A95-449-033

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QUESTIONS PRESENTED

A. DID THE NINTH CIRCUIT COURT OF APPEAL ERR IN DENYING PETITIONER'S PETITION FOR REVIEW CONSTITUTE A DENIAL OF DUE PROCESS?

B. DID THE BOARD OF IMMIGRATION APPEALS DENY THE PETITIONER A FULL AND FAIR HEARING ON ALL ISSUES AFFECTING HIS APPLICATION FOR CANCELLATION OF REMOVAL?

C. LIST OF PARTIES

The party in this case is the United States Immigration and Naturalization Service.

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OPINIONS BELOW

{X} For cases from Federal Courts

The opinion of the United States Court of Appeal appears at Appendix A to the petition and is

{X} is unpublished.

JURISDICTION

{X} For cases from Federal Court

{X} A timely petition for rehearing was denied by the United States Court of Appeal on the following date; August 24,2007, and a copy of the order denying a rehearing appears at Appendix A.

The jurisdiction of this court is invoked under 28 U.S. C. Section 1254 (1)

CONSTITUTIONAL AND STATUATORY PROVISIONS INVOLVED

Immigration and Nationality Act Section 212 (a)(6)(1) 4

United States Constitution 6
Fourteenth Amendment Due Process

STATEMENT OF THE CASE

Petitioner is a forty-one year old male, who is a native and citizen of Mexico. He was born on May 7, 1966. He entered the United States on or about November 1989 and has never left this country. He became subject to removal by the Immigration and Naturalization Service under Section 212 (a)(6)(I) of the Immigration and Nationality Act. In an immigration hearing held on April 4, 2005, Petitioner requested relief from removal in the form of Cancellation of Removal, Section 240A (b) of the Act and was denied by the Immigration Judge.

The Immigration Judge determined that the Petitioner was not eligible for Cancellation of Removal in that he did not demonstrate extreme and exceptional hardship to a lawful permanent resident or American-citizen relative spouse, parent or child.

The decision of the Immigration Judge was then appealed to the Board of Immigration Appeals. On August 18, 2006, the Board of Immigration Appeals affirmed the decision of the Immigration Judge without separate opinion.

Petitioner then filed a timely Petition For Review and Stay of Deportation with the Ninth Circuit Court of Appeal. The Ninth Circuit Court of Appeals denied Petitioner's Motion on August 24, 2007.

The Petitioner now files his Petition for a Writ of Certiorari with the Supreme Court of the United States.

A. THE NINTH CIRCUIT COURT OF APPEAL'S FAILURE TO GRANT PETITIONER'S PETITION FOR REVIEW IS A DENIAL OF DUE PROCESS

Petitioner, who was brought under removal proceedings by the INS, appealed the decision of the Immigration Judge, denying him cancellation of removal, as a form of relief. The Board of Immigration Appeals adopted and affirmed the decision of the Immigration Judge and dismissed the appeal of the Petitioner on August 18, 2006. On October 18, 2006, the Petitioner moved the Board of Immigration and Appeals to reopen its August 18, 2006 decision.

On January 26, 2007, the Board of Immigration Appeals denied the Petitioner's motion to reopen, based on the fact that it was not filed in a timely manner, (i.e. within thirty days), by Petitioner's attorney. The Board also failed to consider the new evidence presented by Petitioner concerning his American citizen child's Bell's Palsey diagnosis and stated that this evidence should have been presented during the initial immigration hearing.

The Petitioner then filed an appeal to the Ninth Circuit Court of Appeal, through his Petition for Review of an Order of the Board of Immigration Appeals on August 20, 2007. This Petition was denied by the Ninth Circuit on August 24, 2007.

The Appellant contends that his Order of Removal issued by the Immigration Judge is based on the ineffective assistance of counsel during his immigration hearing, and later during his appeal process with the

Board of Immigration Appeals. Appellant contends that the ineffective assistance of counsel amounts to a violation of his constitutional rights and a denial of due process under the Fourteenth Amendment of the Constitution.

It has been determined that, "Ineffective assistance of counsel in a deportation proceeding is a denial of due process when the proceeding is so fundamentally unfair that the alien was prevented from reasonably presenting his case. An individual making this argument must show, moreover, that he was prejudiced by his representative's performance." Matter of Lozada 19 I&N Dec. 637 (BIA 1988), and Matter of Grijalva, 21 I&N Dec. 472 (BIA 1996).

Matter of Lozada further specifies the requirements that an applicant must meet in order to support a claim of ineffective assistance of counsel. First, his petition should be supported by an affidavit of the appellant attesting to the relevant facts. Second, before the allegation is presented to the Board of Immigration Appeals, the former counsel must be informed of the allegations and allowed an opportunity to respond. Any subsequent response from counsel should be submitted with his petition. Finally, if it is asserted that the prior counsel's handing of the case involved a violation of ethical or legal responsibilities, the motion should reflect whether a complaint has been filed with the appropriate disciplinary authorities.

The Appellant in this case has met the standard required in Lozada. The Appellant's declaration supports that his counsel failed to submit the evidence of his American-citizen child's disability in the initial immigration hearing, and later to file his petition for review with the Board of Immigration Appeals within

the statutory thirty-day period as required. In addition to preparing an affidavit detailing the matter complained of to his former counsel, the Appellant further made a formal complaint to the State Bar of California. (Appendix F,G)

The procedural requirements set forth in Lozada are essentially a "screening device" which the BIA considers before considering the merits of ineffective assistance claims. Infanzon v. Ashcroft, 386 F.3d 1359, 1362 (10th Cir. 2004). In order to prevail on the merits of an ineffective assistance claim, a petitioner must show that "he was prejudiced by his representative's performance." Lozada, 19 I&N Dec. at 638. The Lozada factors are not rigidly applied, especially when the record shows a clear and obvious case of ineffective assistance. Lo v. Ashcroft, 341 F.3d 934, 937 n. 4 (9th Cir. 2003).

In Tang v. Ashcroft, 354 F.3d 1192, 1196 (10th Cir. 2003), it is understood that an "attorney's deficient performance can amount to exceptional circumstances sufficient to reopen removal proceedings." In other words, the Lozada factors are a threshold procedural requirement before ineffective assistance of counsel may be considered. A motion to reopen on appeal must be granted when the attorney's ineffective performance was clear from the face of the record. Escobar-Grijalva v. INS, 206 F.3d 1331, 1335 (9th Cir. 2000). Herein the attorney's extreme lack of preparedness was "plain on the face of the administrative record."

Further cases have established that in addition to being prejudiced by ineffective counsel, an Appellant may also suffer a due process violation during the course of his representation. Goonswan v. Ashcroft, 252 F.3d. 383, 385, n. 2 (5th Cir. 2001). In Borojes v. Gonzales, 402 F. 3d 398, 408 (3d Cir. 2005), and Saakian v. INS, 252 F.3d 21,

25, (1st Cir. 2001), it was held that to establish fundamental fairness as defined by "due process," the alien must demonstrate a reasonable probability of a different outcome had counsel performed effectively. Reasonable probability of a different outcome was established in Fischetti v. Johnson, 384 F.3d.140, 155, (3d Cir. 2004), wherein failure to explain the legal requirements for political asylum to the alien prior to his immigration hearing, and failure to prepare him for the hearing itself were considered factors that would have lead to a different outcome but/for ineffective counsel.

In this instance the Petitioner attempted to institute reconsideration of the decision of the Immigration Judge, through The Board of Immigration Appeals. This request was denied by the Board of Immigration Appeals, and such conduct amounts to a denial of due process.

Clearly the Petitioner was prejudiced by his attorney's failure to introduce evidence of his American citizen child's disabling illness at his immigration hearing. Such performance and failure to introduce evidence prejudiced the Petitioner's case, and amounted to a due process violation, as the Immigration Judge did not have this information for consideration and review at the time the Petitioner's case was decided.

Cuadras v. INS, 910 F.2d 567, 573, (9th Cir. 1990), establishes that an alien is entitled to the Fifth Amendment guaranty of due process, which is satisfied only by a "full and fair hearing."

The Petitioner was prejudiced a second time when his counsel failed to file a timely appeal with the Board of Immigration Appeals, and instead filed Petitioner's appeal on October 18, 2006, more than thirty days as per the Board of Immigration Appeals statutory regulations.

The Petitioner was then unable to have his case properly reviewed for errors committed at the hearing stage, this raising the issue of a colorable constitutional claim. Clearly due to the ineffective assistance of counsel, the Petitioner did not have a full and fair hearing as is his entitlement, and such hearing may have determined a different outcome in his case.

Based upon the ineffective assistance of counsel, Appellant was denied due process. The evidence of medical hardship to his American citizen child should have been introduced at his immigration hearing, and the BIA should have reopened and remanded his case on appeal since the untimely filing was also due to ineffective assistance of counsel.

B. THE BOARD OF IMMIGRATION APPEALS DENIED THE PETITIONER A FULL AND FAIR HEARING ON ALL ISSUES AFFECTING HIS APPLICATION FOR CANCELLATION OF REMOVAL

Courts have long recognized the power to expel or exclude aliens as a fundamental sovereign attribute exercised by the Government's political departments largely immune from judicial control. The Chinese Exclusion Case, 130 U.S. 581 (1889), Fong Yue Ting v. United States, 149 U.S. 698, (1893), Knauff v. Shaughnessy, 338 U.S. 537 (1950).

However it is also clear that aliens who have once passed through our gates, even illegally, may be expelled only after proceedings conforming to the traditional standards of fairness encompassed in due process of law. The Japanese Immigrant Case, 189 U.S. 186 (1903); Woo

Yan Sung v. McGrath, 339 U.S. 33, (1950), Kwong Hai Chew v. Colding 344 U.S. 590, 598, (1953),

In Wong Yang Sung v. McGrath, 339 U.S. 33, (1950), it is stated that "Our law may, and does place more restrictions on the alien then the citizen. But basic fairness in hearing procedure does not vary with the status of the accused. If the procedures used to judge the alien are fair and just, no good reason can be give why they should not be extended to simplify the condemnation of the citizens. If they would be unfair to citizens, we cannot defend fairness of them when applied to the more helpless alien. This is at the root of our holdings that the alien must be given a fair hearing to test an official claim that he is one of a deportable class."

The court in Shaughnessy v. Mezei, 345 U.S. 206 (1953) further elaborated as follows, "The most scrupulous observance of due process, including the right to know a charge, to be confronted with the accuser, to cross-examine witnesses, and to produce evidence in one's own behalf, is especially necessary. The court stated both the old proceedings by which one may be bound to keep the peace, and the newer systems are safeguarded with full rights to judicial hearings for the accused. On the contrary, the Nazi regime in Germany installed a system of "protective custody" by which the arrested could claim no judicial or other hearing process. As a result the country was filled with concentration camps and summary detentions and deportations. Such practices once established with the best of intentions, will drift into the oppression of the disadvantaged in this country as surely as it has elsewhere. Differences in the process of administration make all the difference between a reign of terror and one of law."

It is well-settled that the Fifth Amendment entitles an alien to due process of law in a removal proceedings. Reno v. Flores, 507 U.S. 292, 306, 123 L.Ed.2d, 1, 113 S. CT. (1993); also Felzcerek v. INS, 75 F. 3d 112, 115 (2nd Cir. 1996).

In the present case the decision of the Immigration Judge was based on incomplete information that was absent documentation verifying that the Petitioner's American-citizen child suffered from Bell's Palsey, a disabling condition, that would result in extreme and exceptional hardship to the child, if the Petitioner was ordered removed from the United States. This information was not presented at the initial immigration hearing of the Petitioner, due to his ineffective assistance of counsel. The Petitioner was later precluded from introducing it through his appeal to the Board of Immigration Appeals, due to the fact that his counsel failed to file his appeal in a timely manner, within the thirty days allotted.

Cuadras v. INS, 910 F. 2d 567, 573, (9th Cir. 1990), establishes that an alien is entitled to the Fifth Amendment guaranty of due process, which is satisfied only by a "full and fair hearing."

In assuring that a fair hearing is provided, it is proper for the INS to take notice of certain facts, and give the petitioner an opportunity to respond. Ohio Bell, 301 U.S. at 306; Banks v. Schweiker, 654 F. 2d 637 (9th Cir. 1981). In Banks, the BIA erred because it did not allow the petitioners in that instance an opportunity to rebut the noticed facts. Therefore the fact that they could file a motion to reopen was not considered sufficient by way of their right to rebut.

The Petitioner challenges the constitutionality of the denial of his Petition For Cancellation of Removal, as his right to a fair hearing was compromised by the ineffective assistance of his counsel.

Petitions for Review such as the one made by the Petitioner to the Ninth Circuit Court of Appeal are presently evaluated under the same standards employed by district courts in evaluating motions for preliminary injunctive relief. Lopez v Heckler, 713 F.2d 1432, 1435, 463 U.S. 1328 (1983). In Lopez it is stated, "The petitioner must show either a probability of success on the merits and the possibility of irreparable injury, or that serious legal hardships are raised and the balance of hardships tips sharply in the petitioner's favor."

The case of Arthurs v. INS, 959 F.2d 142, 143-44 (9th Cir. 1992) further expands the standards for review by stating that, "These standards of review represent the outer extremes of the continuum, with the relative hardships to the parties providing the critical element in determining at what point on the continuum a stay pending review is justified."

During the evolution of the Immigration and Nationality Act, the case of Artukovoc v. Rison, 784 F.2d 1354, 1355, (9th Cir. 1986), added a further requirement that specified "that the petitioner is required to establish either a probability of success on the merits and the possibility of irreparable injury, or that serious legal questions are raised and the balance of the hardships tips sharply in petitioner's favor."

Therefore based on the above decisions it is entirely proper for the court herein to review the denial of Petitioner's Request For Review with the Ninth Circuit

Court, because there is a high probability that he can prevail on the merits of his claim.

REASONS FOR GRANTING THE WRIT

1. The Court of Appeal Erred In Upholding The Immigration Judge's Decision As The Petitioner Was Prejudiced By Ineffective Assistance of Counsel

It is the Petitioner's contention that the 9th Circuit Court of Appeals further erred in supporting the Immigration Judge's finding that the Petitioner did not establish that his American-citizen child would suffer extreme and unusual hardship as required by the Act, if Petitioner were removed from the United States.

It has been well-settled that, "Many factors must be taken into consideration in making a determination of hardship. All factual data and relevant facts presented must be completely analyzed. Failure to consider any of the facts presented constitutes an abuse of discretion" "In making its determination, the court should look at: "age of the subjects, family ties in the U.S. and abroad; length of residency in the U.S. conditions of health, conditions in the country to which the alien is returnable, economic, political, and financial status, business and occupation, the possibility of other means of adjustment, whether of special assistance to the U.S. or the community, and immigration history. "In making this determination, relevant factors though not determinative in themselves, must be considered in the aggregate in determining whether extreme hardship exists." Salamenda v. INS, 70 F. 3d 447 (7th Cir. 1995).

Herein the Petitioner was precluded from presenting any evidence in his favor regarding the hardship his American citizen child would suffer, and his disabling condition. Had the Petitioner been able to present this evidence, the outcome of the judicial decision may have been different. Had the Petitioner been able to present his case on appeal in a timely manner, his case may have been remanded for further consideration, instead of being dismissed.

The Petitioner contends that he was unfairly denied consideration of his claim for extreme and unusual hardship on behalf of his minor American citizen child, in that the Immigration Judge did not have an opportunity to review the final medical report of the child's treating physician. Petitioner further contends that his child's disabling condition should have qualified as extreme and exceptional, in that the child needed to remain in the United States to continue receiving medical treatment, and that circumstances would require that the Petitioner take the child to Mexico with him, if he were removed.

In the Matter of Recinas, 23 I&N Dec. 467 (BIA 2002), The Board concluded that the Respondent in that case did establish "exceptional and unusual hardship. Herein the Respondent was a 39-year-old single mother of four U.S. citizen children. ages 12, 11, 18, and 5, and two minor respondents, ages 15, and 16. The Respondent in that instance had no close relatives in Mexico and her entire family lived in the United States. The Respondent was the sole support of her family and was self-employed. Additionally her children had spent their entire lives in the U.S. and did not speak Spanish.

The most significant factor about Recinas, is the fact that the Board stated that the "hardship standard was not so restrictive that only a handful of applicants, such as those who have a qualifying relative with a serious

medical condition, will qualify for relief." The Board after engaging in a "cumulative analysis," found that the Lawful Permanent Resident parents of the Petitioner formed a "strong system of family support" which the children would lose if they were removed to Mexico.

Separation from family and children may be considered the most extreme form of hardship. Bastides v. Immigration and Naturalization Service. 609 F.2d 101 (1979), established that emotional issues must be considered factors in determining hardship. In that instance the court failed to recognize emotional hardship which would result from separation of the alien who expressed deep affection for his child, and who had been shown to have acted consistently with his expression of affection. Therein insufficient consideration was given to non-economic hardship that would result from the alien's deportation. Thus remand was required in this case.

Historically the court has ruled that family and relationships between family members occupies a place of central importance in our nation's history and are a fundamental part of the values that underlie our society. Moore v. City of East Cleveland, 431 U.S. 494, 97 S. Ct. 1932, 52 L. Ed. 2d 531 (1977).

Additionally the court in Urbano de Malaluan v. Immigration and Naturalization Service, 577 F.2d 589 (9th Cir. 1978), reversed an order of the Board of Immigration Appeals denying a motion to reopen proceedings, emphasizing that the "separation of the petitioner from members of her family who are United States citizens must be considered in conjunction with economic detriment in reaching the eligibility decision."

In Wang v. Immigration and Naturalization Service, 622 F.2d 1341 (1980), the court reasoned that the

minor children of the Wangs , who have spent their whole lives in the United States, may suffer potential hardship if they were forced to leave this country. Accordingly the court held that the Board should not have summarily dismissed the Wang's claim of hardship to their children. It was held that the effect that the deportation of the parents would have on the Wang children should be determined only after a hearing.

In Ramirez-Gonzalea v. INS, 794 F.2d 491 (9th Cir 1986), and in Carnalla-Munoz v. INS. 627, F.2d 1004 (9th Cir. 1980), the court recognized that "the most important single hardship factor may be the separation of the alien from the family living in the United States. It was further held in Prapavat v. INS, 662 F.2d 561, 563 (9th Cir. 1981), that "Family unity is always an important consideration, " and "Failing to consider the cumulative effect of all relevant factors in a case can also be found to be an abuse of discretion."

Additionally when the Court fails to consider the impact of separation of the parent from the child that can amount to an abuse of discretion on its part. Reyes-Melendrez v. INS, --F.3d—2003 WL 22053448, (9th Cir.Sep. 4, 2003).

The 9th Circuit Court of Appeal erred in supporting the position of the BIA, and failing to recognize that ineffective assistance of Petitioner's counsel resulted in a denial of due process. That directly affects the Petitioner's American citizen child.

The case of Jara-Navarette v. INS, 813 F.2d 1340, (9th Cir. 1986), strongly emphasized the point that the Court must examine every conceivable circumstance that may cause the United States citizen child of a respondent to suffer hardship due to his or her deportation. The Court

stated, "In reviewing BIA decisions involving hardship to the United States citizen children, generalizing rather than individualized consideration and cursory treatment of individual circumstances constitute an abuse of discretion. Thus we have not hesitated to vacate denials of applications for suspension of deportation when the BIA abuses its discretion in examining hardship to United States citizen children." The failure of the Court to review and consider this evidence established that it did not act on evidence that was reasonable, substantial and probative.

Additionally courts in other than the Ninth Circuit have been vigilant in ensuring that the BIA gives individualized consideration to United States citizen children. In Ramos v. INS, 695 F.2d 181 (5th Cir. 1983), the petitioners had two United States children, ages seven, and nine, at the time of the deportation hearing. The Court held that the BIA had not sufficiently examined how a child of a grammar school age might suffer from being uprooted from his life in the United States and remanded the case for further consideration.

In this instance the 9th Circuit Court further erred by supporting the Immigration Judge's decision that removal of the Petitioner would not cause hardship to his son, without having been provided medical evidence to substantiate Petitioner's claim.

An abuse of discretion on the part of a reviewing Court must create a situation in which the abuse negatively and distinctly impacts the outcome of the case. Rejection of all evidence presented, without carefully analyzing all of it terminates an alien's ability to obtain a favorable outcome. If the Court without thoughtful review of the Board's decision allows the dismissal of all evidence presented, any apply alien can fail to meet the

requisite standard for hardship. While the Court is vested with authority and discretion, it must be exercised wisely and in a manner that assures that aliens who are before it are able to receive a full and fair review of their cases. This is becoming more important since fewer and fewer forms of judicial review are available under the present immigration laws.

When strong evidence is presented and yet disregarded, this goes directly to the merits of the case and is clearly an incorrect decision. When there is no justification for rejection of evidence, an abuse of discretion is likely present.

Herein the conduct of the reviewing Court in failing to recognize that the Petitioner was prejudiced due to ineffective assistance of counsel, denotes the rise of a colorable constitutional claim. The Court found in Chavez-Murillo v. INS,1999 WL 728521 (9th Cir. 1999) that the Congressional intent to preclude judicial review of constitutional claims must be clearly evidenced. When a parent is denied cancellation of removal, the government effectively deports the United States born children of that parent as well. This unconscionable result violates due process by forcing children to suffer de facto expulsion from the country of their birth or forego their constitutionally-protected right to remain in this country with their family intact. "The integrity of the family unit has found protection in the Due Process Clause of the 14th Amendment. Stanley v. Illinois, 405 U.S. 645, 651 (1972)

CONCLUSION

Petitioner, through his counsel, contends that the Ninth Circuit Court of Appeals erred in denying his Petition for Review. Petitioner's petition was based on the ineffective assistance of his counsel in failing to submit necessary evidence for consideration by the Immigration judge, and then in failing to file his appeal on the decision of the Immigration Judge in a timely manner.

Based upon the aforementioned, Petitioner respectfully requests that this Honorable Court grant the Writ of Certiorari, and permit his case to be reopened and remanded so that he can present his application for relief from removal before the Immigration Court.

Dated: October 31, 2007

Respectfully Submitted,

GARY D. OLIVE,
Attorney at Law

FILED
Aug 24 2007
CATHY A. CATTERSON
CLERK
U.S. COURT OF APPEAL

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

JOSE MONDRAGON CHIMAL Petitioner, v. ALBERTO R. GONZALEZ, Attorney General, Respondent.	No. 07-70705 INS Nos. A79-520-482 **MEMORANDUM**

Before: SCHROEDER, Chief Judge, KLIENFEL and M.

The is a petition for review of the Board of Immigration Appeals, ("BIA") order denying petitioner's motion to reconsider the BIA's August 18, 2007 order, and motion to reopen proceedings. Respondent has filed a motion for summary disposition in part and a motion to dismiss in part.

This disposition is not appropriate for publication and is not precedent except as provided by 9th Cir. R. 36-3

This panel unanimously finds this case suitable for decision without oral argument. *See* Fed. R. App. P.34(a)(2)

APPENDIX A

We have reviewed the petition for review and motion for stay of removal, and we conclude that summary disposition in part is appropriate because the questions raised by this petition for review are so insubstantial as not to require further argument. See *United States v. Hooton*, 693 F.2d 857, 858, (9th Cir. 1982) (per curiam) (stating standard). The regulation provides that 'a motion to reconsider a decision must be filed with the Board within 30 days after the mailing of the Board decision." See 8 C.F.R. Section 1003.2(b)(2). The BIA did not abuse its discretion in denying petitioner's motion to reconsider filed on October 18, 2006, more than 30 days after the BIA's August 18, 2006 decision. According, respondent's unopposed motion for summary disposition is in part granted.

Further, to the extent petitioner is seeking review of the BIA's denial of the motion to reopen, we conclude that petitioner has failed to raise a colorable constitutional or legal claim to invoke our jurisdiction over this petition for review. *See Torres-Aguilar v. INS*, 246 F.3d 1267, 1271 (9th Cir. 2001). Accordingly, respondent's unopposed motion to dismiss this petition for review for

unopposed motion to dismiss this petition for review for lack of jurisdiction is granted. *See* 8 U.S.C. Section 1252(a)(2)(B)(i); *Fernandez v. Gonzales*, 439 F.3d 592 (9th Cir. 2006); *Romero-Torres v. Ashcroft*, 327 F.3d 887, 892, (9th Cir. 2003); *Montero-Martinez v. Ashcroft*, 277 F.3d 1137, 1144 (9th Cir. 2002).

All other pending motions are denied as moot. The temporary stay of removal and voluntary departure confirmed by the Ninth Circuit General Order 6.4© and *Desta v. Ashcroft*, 365 F.3d 741 (9th Cir. 2004), shall continue in effect until issuance of the mandate.

PETITION FOR REVIEW DENIED in PART; DISMISSED in PART

U.S. Department of Justice Decision of the Board of Immigration Appeals
Executive Office of Immigration Review

Falls Church, Virginia 22041

Date: JAN 26, 2007

File: A79-520-482 Los Angeles

In re: MONDRAGON CHIMAL JOSE

IN REMOVAL PROCEEDINGS

MOTION

ON BEHALF OF RESPONDENT: Pro se

ORDER:

PER CURIAM. The respondent moves the Board pursuant to 8 C.F.R. Section 1003.2 to reopen and reconsider our decision dated August 18, 2006. On August 18, 2006, we dismissed the respondent's appeal form the immigration Judge's denial of cancellation of removal due to failure to establish the requisite hardship to qualifying relatives. The instant motion was filed on October 18, 2006. To the extent that the motion alleges error in our prior decision and the evaluation of the evidence pertaining to hardship, it is a motion to reconsider and is untimely (filed in excess of the 30 days after the date of our August 18, 2006, decision). *See* 8 C.F.R. 1003.2(b)(2). To the extent that the respondent has filed a motion to reopen, submitting additional evidence relating to one of the United States citizen children's history of Bell's Palsey, we note that at the hearing before the Immigration Judge, testimony and documentary evidence of the child's history of this disorder was considered. The October 16, 2006, statement of a private physician, submitted in support of reopening is essentially similar to the evidence preciously considered. Reopening is not warranted, as the respondent has not shown that this evidence could not have been presented at the prior hearing. Accordingly, the motion is denied.

"s/_____"

FOR THE BOARD

APPENDIX B

UNITED STATES DEPARTMENT OF JUSTICE
EXECUTIVE OFFICE FOR IMMIGRATION REVIEW UNITED STATES IMMIGRATION COURT LOS ANGELES, CALIFORNIA

File No: A 79 520 482

April 4, 2005
IN REMOVAL PROCEEDINGS

In the Matter of
JOSE MONDRAGON CHIMAL
Respondent

CHARGE: Section 212(a)(6)(A) of the Immigration and Nationality Act. {8 U.S.C. Section 1182(a)(6)(A)} *Entered without permission or parole*

APPLICATION: Section 240A (b) of the Immigration and nationality Act-Cancellation of removal, and Section 240B(b) of the Immigration and Nationality Act-Voluntary departure.

ON BEHALF OF RESPONDENT:	**ON BEHALF OF SERVICE:**
Joubin Nasserumi Esq. **617 S. Olive St. #500** **Los Angeles CA. 90014**	**Katherine Halliday-Roberts, Esq.**

APPENDIX C

ORAL DECISION AND ORDER OF THE IMMIGRATION JUDGE INTRODUCTION AND PROCEDURAL SUMMARY

The respondent is a 38-year-old married male native and citizen of Mexico who entered the United States on or about November 1989 at or near San Ysidro, California. On June 20, 2001, the Immigration and naturalization Service commenced removal proceedings by failing a Notice to Appear, charging the respondent as captioned above. Also see Exhibit 1.

The respondent admitted the factual allegations contained in the notice to appear, dated June 20, 2001. and conceded removability. Therefore, the Court finds removability has been established by clear and convincing evidence as required by the Act. See INA Section 240© (3) (A). In the even that the respondent's removal becomes necessary, the Court, pursuant to Section 241 (b) (2) (c) of the Act, designated Mexico, the country of which the respondent is a native and citizen.

In addition to the testimonial evidence, a number of documents were entered into the record as the following exhibits. Exhibit 1 is the Notice to Appear, dated June 20, 2001. Exhibit 2 is the respondent's application for asylum and withholding of removal, Form I-589, withdrawn on August 29, 2001. Exhibit 3 is the respondent's application for cancellation of removal and supporting documents, pages 1-through 211. Exhibit 4 is additional supporting documents, listing pages 212 through 230. Exhibit 5 is additional supporting documents, listing pages 231 to 264. Exhibit 6 is additional supporting documents, including the background information of the psychologist who testified at the hearing. I've considered all the documentary evidence, as well as the testimony in this case and they will be incorporated into this decision by reference.

Applicable Law and Legal Analysis

Statutory Eligibility

To be eligible for cancellation of removal Section 240A (b) of the Act, the respondent must establish that:

1. He has been physically present in the United States for a continuous period of not less than ten years.
2. he has been a person of good moral character during such period and up to the date of such application;
3. He has not been convicted of an offense under Section 213 (a) (2), 237 (a) (3) of the Act; and
4. His removal would result in exceptional and extremely unusual hardship to his spouse, parent, or child who is a United States citizen or a lawful permanent resident.

The respondent has established through testimony and documentary evidence, that he has been present in the Untied States for a continuous period of 10 years. He has also established , through testimony and documentary evidence, that he is a person of good moral character. He has not been convicted of an offense under Section 213 (a) (2), 237 (a) (2) or 237 (a) (3) of the Act. The only remaining issue is whether the respondent has established that his removal from the United States would result in exceptional and extremely unusual hardship to have three united States citizen children, Alejandra, age 13, Jose, age 10, and Diego, age six.

To establish exceptional and extremely unusual hardship, an applicant for cancellation of removal under that section 240A(B) of the Act must demonstrate that his or her spouse, parent or child would suffer hardship that is substantially beyond that which would ordinarily be expected to result from an alien's deportation, but need not show that such hardship would be unconscionable.

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See Matter of Monreal, 23 I&N Dec. 56 (BIA 2001). The Board has held that although many of the factors that were considered in assessing extreme hardship for suspension of deportation should also be considered in evaluating exceptional and extremely unusual hardship. An applicant for cancellation of removal must demonstrate hardship beyond that which has historically been required in suspension of deportation cases, involving extreme hardship standard. See Matter of O-J-O-, 21 I&N Dec. 381 (BIA 1996). In Matter of Anderson, 16 I&N Dec. 596 (BIA 1978), and establishing eligibility for cancellation of removal, only hardship to the qualifying relatives, not to the applicant, him or herself, may be considered. And hardship factors relating to the applicant may be considered insofar as they might affect hardship to the qualifying relatives. See Monreal, supra.

The respondent testified he entered the United States in 1989. He's remained in the United States since he first entered. Prior to coming to the United States, he was a student in Mexico, where he attended school up to the first year of university. After arriving in the United States, he was employed in various capacities. He is currently employed at a company where he supervises painters and has recently become a vice president of the company. He earns approximately $850 per week. The respondent testified that he has a number of family members living in the United States. He has uncles, aunts and cousins, who are United States citizens or lawful permanent residents. His parents, three brothers and one sister live in the United States, but they have no lawful status in this country. He has no close relatives living in Mexico. The respondent is

married to Elena Mondragon. She is the mother of his three children. She does not have lawful status in this country. She does have one sister living in the United States, but no family members living in Mexico.

The respondent has three children born in the United States. Alejandra is 13 years of age. She's in the eighth grade at school, where her classes are conducted in the English language. She speaks English at home and is in general good health. The respondent testifies that Alejandra is unable to read or write the Spanish language. She does speak some Spanish, but prefers to speak English. Jose is 10 years of age. He's in the forth grade at school, where his classes are conducted in the English language. He attends regular classes, but also is taking classes after school to help him keep up with his grade level. He speaks English at home and is in general good health. Diego, age six, is in kindergarten at school. He speaks English at home. Diego has suffered from a condition called Bell's Palsey. We have some documents in the file that relate to that particular disease. And they are found, largely in Exhibit 4. It appears that the particular syndrome is caused by a virus that may be found in the environment. The psychologist to testify at hearing provided a report. And her initial report, she indicated that Diego, who suffered from this illness, was 95% recovered. Documents that referred to the disease from the Internet indicate that it is, in fact, caused by a virus. It may require some additional treatment to overcome this particular illness, but there is no clear cure, and there's no clear reason why this particular virus affects people.

The respondent testified that if he is required to leave the United States, he believes he may take his children with him, but he has made

no firm plans to leave them in the United States. A respondent who testifies that he wishes to leave his children in the Untied States would be required to provide evidence demonstrating that reasonable provisions have been made for the children's care and support and must explain how such a problem would be reasonably carried out. The respondent has not provided any such evidence. Therefore, I must consider that the respondent would take his children to Mexico if he were ordered removed to that country. See Matter of Ig., 20 I&N Dec. 880 (BIA 1994).

In considering that the respondent may be removed to Mexico, I must consider what hardship would befall his United States children. The respondent testified that if he is required to leave the United States, his entire family would suffer various forms of hardship. First , the respondent has been away from Mexico for a number of years. It may be difficult for him to adjust to life in Mexico after having spent a number of years here in the United States. Likewise, it may be difficult for his children to adjust to life in Mexico. This may be particularly important for Diego, who is currently suffering from separation anxiety. Respondent also testified that if he is required to return to Mexico, the entire family would suffer economic hardship. The economy of Mexico is not the same as the economy here in the United States. He testified it may be difficult for him to obtain employment in Mexico, particularly at the same type of job that he has here in the United States. He also stated that even if he were able to obtain employment in Mexico, his salary would not permit him to support his family at the same level as they are being supported here in the United States. The respondent He also stated that even if he were able to obtain employment in Mexico,

particularly at the same type of job that he has here in the United States. He also stated that even if he were able to obtain employment in Mexico, his salary would not permit him to support the family at the same level as they re being supported here in the United States. The respondent testified that his children would also suffer and that the schools of Mexico are different from the schools in the Untied States. His children would be deprived of the education that they can get in the United states and opportunities that would flow from that education.

The respondent testified in detail about the hardships that Diego would suffer if he were required to leave the United States. He has provided some documentation with regard to the fact that his son had suffered from Bell's Palsey and is receiving some treatment in that regard. The medical documentation that has been received indicates that Diego receives occasional follow up visits t ensure improvement. There's also a note recommending that Diego see a neurologist and there is no documentation to show that this has been accomplished. The psychologist's report does reflect that Diego is 95% recovered from this episode with Bell's Palsley. Another issue seems to be Diego's separation anxiety. In referring to a report from Hogue Hospital, dated march 23, 2005, at page 231 of Exhibit 5, a social worker simply confirms that Diego is receiving treatment for issues concerning his school and his mother. Diego, evidently, was referred to this organization to receive treatment for his separation anxiety. However, at Exhibit 5, page 233, is a report from the school. That report indicates that Diego is making great progress in overcoming his separation anxiety, thanks to Diego's mom making

the hard decision to allow Diego to cry. He now seems able to become fully involved in his learning tasks at hand. The report also reflects that, in large part, his work at school is satisfactory. He needs some improvement in self-control. It would appear that Diego, who is in the kindergarten at school, is having a difficult time separating from home and family. There's also some indication that Diego's mother was working as a teacher's aide and this made Diego have close access to his mom during the school day. So, there seems to be some problems separating from the family and attending school. I don't find that this is a serious problem. I also don't find that the Bell's Palsey that the child suffered from is currently a serious problem. He is 95% recovered from that illness that is caused by a virus. I recognize that Diego would suffer what I would characterize this extreme hardship if he is required to leave the United States. I do not find, however, that it raises to level of exceptional and extremely unusual hardship. And that is the requirement in order to obtain cancellation of removal.

I've considered the testimony of the respondent and I've considered the testimony of the psychologist. The psychologist's testimony and report is diminished by the fact that she has not consulted with the teachers who see the children on a regular basis. The can judge how the children interact with their peers and with adults, how they react to stress within the school system. I also find that her report is diminished in large part. Through testimony, it becomes clear that she has never acknowledged that a child may be removed from the United States without suffering exceptional and extremely unusual hardship. Considering all of the factors raised by the

respondent, individually and in the aggregate, I find that they do not rise to the level of exceptional and extreme hardship.

Fist, when considering the readjustment of an alien to life in his native country after having spent a number of years here in the Untied states, the courts have found that the readjustment of an alien to life in his native country after having spent a number of years in the United States, would not be considered the type of hardship that would be characterized as extreme under the old suspension of deportation laws. The courts have found that similar hardship is suffered by most aliens who've spent a lengthy time in the Untied States. Additionally, even though children may face difficulty adjusting to life and their parents home country, these problems do not materially different from those encountered by other children who must relocate with their parents. See Ramirez-Durasso v. INS, 794 F.2d 491 (9th Cir. 1986).

The respondent has pointed to the hardships that his family may suffer if removed to Mexico. In particular, he identifies the economic hardship that his family would suffer, because the economy of Mexico is different that the economy here in the United states. When reviewing the impact of economic hardship on an alien and his Untied states citizen children, the courts have found that economic detriment alone was insufficient to support a claim under the less stringent standard of extreme hardship associated with suspension of deportation. See Matter of Pilch, 21 I&N Dec. 627 (BIA 1996).

The respondent expressed concern over his ability to obtain employment in Mexico. In

particular, at his chosen profession as a supervisor of painters. The Court found that the mere loss of current employment and the inability to maintain one's present standard of living or to pursue a chosen profession, did not constitute extreme hardship under the old suspension of deportation laws. See Banks v. INS, 594 F.2d 760 (9th Cir. 1979).

The respondent expressed concern over his children's educational opportunities in Mexico. I recognize that Mexico likely will not provide the respondent's children with an education equal to that which they may obtain in the United States. However, the respondent has not established that his children would be deprived of all schooling or an opportunity to obtain an education in Mexico. In Re Andazola, 23 I&N Dec. 319 (BIA 2002), the Board pointed out in a footnote at page 323, that if diminished educational opportunities will result in a finding of exceptional and extremely unusual hardship, then cancellation of removal would be granted to virtually all cases involving respondents from developing countries, who have young United States citizen or lawful permanent resident children. This view is not consistent with the Congressional intent.

I compare this case to the case In Re Andazola, 23 I&N Dec. 319 (BIA 2002). In that case, the respondent was a single mother with two United States citizen children, ages 11 and six. She had health insurance through her employer, as well as a retirement program. She had no relatives in Mexico. Her entire family was in the United States without lawful status. She did not believe she would be able to obtain employment in Mexico if she were returned to that country. She

was afraid her children would not be able to get an education in Mexico, especially when they would get older and reached the pint where she might have to pay for their education.

The Board of Immigration Appeals concluded that while almost every case will present some particular hardship, the fact pattern presented in Andazola, was a common one in the hardships outlined by the respondent were simply not substantially different from those that would normally be expected upon removal to a less developed country. Although the hardships presented in Andazola might have been adequate to meet the former extreme hardship standard for suspension of deportation, they were not the types of hardship envisioned by Congress when it enacted the significantly higher standard of exceptional and extremely unusual hardship associated with cancellation of removal.

In comparing this case to the case In Re Andazola, I find some significant differences. The respondent in this instance comes from an intact family. He is married. If he is returned to Mexico, he may depend on his wife fro emotional, if not financial support. Although his wife is currently in the United States, she has no lawful status in this country and it is likely that she would follow him to Mexico if her were required to return to that country. Even if she remained in the United States, he would be in no different position that the respondent in Andazola.

I've considered all the hardships outlined by the respondent individually and in the aggregate. I find that they do not rise to the level of exceptional and extremely unusual hardship. I

must therefore deny this application for cancellation of removal. The respondent has applied for the privilege of voluntarily departing the Untied States. I find that he is statutorily eligible for that relief and I will grant it as a matter of discretion.

The orders in this case are as follows:

IT IS ORDERED that the respondent's application for cancellation of removal and adjustment of status, pursuant to Section 240A(b) of the Act be denied.

IT IS FURTHER ORDERED that in lieu of an order of removal, the respondent be granted voluntary departure without expense to the government, on or before June 3, 2005. The respondent is also required to post a $500 voluntary departure bond with the Department of Homeland Security within five business days of this order to ensure his compliance.

IT IS FURTHER ORDERED that if the respondent fails to depart as required or otherwise fails to comply with this order, the above order granting voluntary departure shall be withdrawn without further notice or preceding and following orders shall thereupon become immediately affected. The respondent shall be removed to Mexico on the charge contained in the Notice to Appear.

PATRICK T MCDERMOTT
Immigration Judge

APPENDIX C

§ 212(a)(6)(A)(1)

INA

(6) Illegal Entrants and Immigration Violators

(A) Aliens Present Without Permission or Parole

(i) In General

An alien present in the United States without being admitted or paroled, or who arrives in the United States at any time or place other than as designated by the Attorney General, is inadmissible.

U.S. Constitution: Fourteenth Amendment

Amendment Text
Annotations

Section. 1. all persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens in the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; not deny to any person within its jurisdiction the equal protection of the laws.

APPENDIX E

THE STATE BAR OF CLAIFORNIA
CALIFORNIA ATTORNEY COMPLAINT FORM

Read Instructions Before Filling Out This Form

Date: 10/1/07

(1) Your name and address Jose Mondragon, 377 Avacado Street, #C Costa Mesa, California 92627

(2) Telephone number: (949) 574-9632 Work (949) 872-9113

(3) The name, address and telephone number of the attorney you are complaining about. Joubin Nasseri,j 617 S. Olive St. #500 Los Angeles CA. 90014

(4) Have you or a member of your family complained about this attorney's previously? If yes, please state to whom the previous complaint was made, its approximate date and disposition. No

(5) Did you employ the attorney? Answer Yes or No, and if "Yes," give the approximate date you employed the attorney(s) and the amount if any, paid to the attorney(s) He was employed in 2003. I do not recall the month. I paid $8500.00 over a period of time to him.

(6) If your answer to #5 above is "No," what is your connection with the attorney? N/A

(7) Include with this form (on a separate piece of paper) a statement of what the attorney did nor did not do which is the basis of your complaint. Please state the facts as you understand them. Do

(8) not include opinions or arguments. If you employed the attorney, state what you employed the attorney to do. Sign and date each separate piece of paper. Additional information may be requested. (Attach copies of pertinent documents such as a copy of the fee agreement, cancelled checks or receipts and relevant correspondence.

(9) If your complaint is about a lawsuit, answer the following, if known: N/A

Name of court (For example, superior or Municipal Court, and name of county)

Title of the suit (For example, Smith v. Jones)

Case number of the suit

Approximate date the suit was filed

If you are not a party to this suit, what is your connection? Explain briefly.

(10) Size of law firm complained about:

1 Attorney 2-10 Attorneys 11+ Attorneys

Government Attorney Unknown X

NOTE: If you are complaining about more than one attorney, include the information requested in items #3 through#8. Use separate sheets if necessary.

Signature_"s/_____"

APPENDIX F

DECLARATION OF JOSE MONDRAGON

I, JOSE MONDRAGON, state that I am the Declarant in this matter. If called to testify I will testify as follows:

1. That in approximately 2001, I retained the services of a notario, the Guadalupana Immigration Services to represent me in my immigration matter. They convinced me that I was eligible for some type of political asylum, as a Mexican citizen

2. I filed for political asylum with this office.

3. They assigned Sung U. Park, Attorney at Law, for one day, to represent me in court.

4. He represented me in court in 2003 when I was in removal proceedings.

5. I was attempting to have my claim for relief in the form of cancellation of removal granted by the court.

6. Subsequent to that time, on or about 2003, the FBI staged a raid on the office of the notario, Guadalupana Immigration Services.

7. They confiscated many of the case files. Roberto Fernandez, Director, was taken into custody as a result of his fraudulent operation.

8. I never saw Mr.park again.

9. I was later contacted y Mr. Joubin Nasssari, an attorney, who had also worked for this notario.

10. He asked if I wanted him to continue representing me.

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11. Mr. Nassseri never prepared me for the hearing on cancellation of removal, with the exception of reviewing my application. He never informed me that I would have to demonstrate extreme hardship to an American citizen or lawful permanent resident, child, parent, or spouse.

12. At my hearing I had in my possession medical and psychological evaluations from several doctors on my son, Diego's condition, Bell's Palsey. My attorney never asked to view these reports, nor did he indicate that they were necessary at the time of my hearing.

13. My attorney never questioned me about my son's condition, nor did he introduce evidence from the treating medical providers as to this particular condition and the resultant hardship.

14. After my cancellation petition was denied, my attorney then started to look at additional evidence that might support my case.

15. I contacted Mr. Nasseri to file and appeal with the BIA on the decision of the Immigration Judge.

16. It was my understanding that Mr. Nasseri was going to file my appeal within thirty days as required.

17. I later learned from the decision of the BIA, that my appeal had been rejected for being filed in an untimely manner, and not within the statutory time limitations.

18. That I believe I was victimized by my attorney, and his ineffective assistance, first by not

introducing the necessary evidence at the immigration hearing, and secondly, by failing to file my appeal to the Board of Immigration Appeals in a timely manner.

This declaration is true and correct to the best of my knowledge and executed under penalty of perjury at Los Angeles, California on October 21, 2007.

_____

JOSE MONDRAGON